[Unapproved and subject to change]
CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF MEETING, Public Session

May 12, 2005

Call to order: Chairman Liane Randolph called the monthly meeting of the Fair Political Practices Commission (Commission) to order at 9:48 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Randolph, Commissioners Sheridan Downey, Eugene Huguenin, and Ray Remy were present. Commissioner Blair was absent.

Item #1. Public Comment.

None.

Items #2, #3, #4.

Commissioner Huguenin moved approval of the following items in unison:

Item #2. Approval of the April 19, 2005, Commission Meeting Minutes.

Item #3. Failure to Timely File Major Donor Campaign Statements.

a. **In the Matter of Golden 1 Credit Union, FPPC No. 05-248 (3 counts).**

Item #4. Failure to Timely Disclose Late Contributions – Proactive Program.

a. **In the Matter of Committee To Elect Ralph L. Franklin, FPPC No. 04-466** (10 counts);

b. **In the Matter of Daviselen Advertising, Inc., FPPC No. 05-118** (1 count);

c. **In the Matter of Northwestern Mutual Life Insurance Company, FPPC No. 05-127** (1 count);

d. **In the Matter of Morrison Homes, FPPC No. 05-128** (1 count);

e. **In the Matter of John Mourier Construction, Inc., FPPC No. 05-132** (1 count);

f. **In the Matter of 25th Ward Regular Democratic Organization, FPPC No. 05-120** (1 count).

Commissioner Downey seconded the motion. Commissioners Downey, Huguenin, Remy, and Chairman Randolph supported the motion, which carried with a 4-0 vote.

Commissioner Remy commented that he thought the minutes of the FPPC meetings were very good and thorough.

ACTION ITEMS

Item #5. Approval of Campaign Disclosure Manuals for State Candidates, Their Controlled Committees, and Committees Primarily Formed to Support or Oppose State Candidates (Manual 1), and for Local Candidates, Candidates for Superior Court, Their Controlled Committees, and Committees Primarily Formed to Support or Oppose Local Candidates (Manual 2).

Technical Assistance Division Chief Carla Wardlow said that these manuals were newly created in 2004 and have been revised to include new legislative and regulatory amendments that were enacted last year. She requested approval of the updated manuals.

Commissioner Downey moved approval of the two manuals.

Commissioner Remy seconded the motion. Commissioners Downey, Huguenin, Remy, and Chairman Randolph supported the motion, which carried with a 4-0 vote.

Item #6. Discussion of Amendment to Regulation 18702.4: Proposed Adoption of Regulation 18750.2 and Regulation 18755.

Assistant General Counsel John Wallace said that these three items concern disclosure and disqualification provisions of the Political Reform Act (PRA).

Mr. Wallace explained that proposed regulation 18750.2 was developed to provide a procedure for agencies exempt from the Administrative Procedures Act (APA) in enacting their conflict-of-interest codes. For those public officials that are required to file Statements of Economic Interests (SEI's), generally the disclosure requirement and its scope are set out in the conflict-of-interest code of the agency. The Commission has established specific procedures for adopting codes, incorporating APA procedures so employees and the public have adequate notice and opportunity to be heard. But, some agencies are not subject to the APA, so 18750.2 was developed and is intended to set out a procedure for those agencies.

Mr. Wallace said that staff held an interested persons meeting and made three changes as a result of the feedback that was received. First, in response to comments from the judicial counsel and the PUC, staff added language on the first page of 18750.2, line 7, to clarify the scope of the regulation to make it clear that the regulation only applies to those agencies under the Commission's authority as a code reviewing body, which does not include agencies in the judicial branch of government. Second, on line 9, staff clarified that the regulation would only apply to those agencies that are exempt from the APA requirement to publish notice because some agencies like the PUC comply with other APA provisions but are not required to publish notice for most of its regulations. Third, staff proposes to delete the language beginning at line

22 on page 2, through line 4 on page 3. That language was taken from existing regulations that apply to other state agencies, but they are really APA requirements that would not apply to agencies subject to this regulation, and staff proposes to delete them.

Mr. Wallace continued that regulation 18755 concerns a smaller subgroup of employees at the UC and CSU. Early in the history of the PRA, the Commission recognized the difficulty in applying conflict-of-interest disclosure and disqualification rules to researchers on either campus. Thus, over time, staff has developed a hybrid disclosure procedure that applies to principal investigators. Proposed regulation 18755 seeks to codify this hybrid procedure. Since the February meeting there have been many nonsubstantive changes to clarify the application of the rule, and one new decision point that has been added in subdivision (b) on page 1, line 16. Currently, there are three types of filings that the principal investigators comply with: an initial filing, interim filing, and a final filing. The UC has pointed out that the final filing may be difficult but also remote and unrelated to the decision that could create the conflict, which is the decision to accept the funding. Staff believes that there is not a huge benefit from this type of disclosure compared with the specific type of conflict-of-interest rules that apply to the principal researchers. Thus, staff recommends dropping the final filing.

Mr. Wallace requested adoption of all of the regulations and adoption of 18755 without the final filing requirement.

Commissioner Remy asked whether staff have listed all of the foundations that are exempt and questioned how one get added to the list.

Mr. Wallace said that all the current foundations to be exempt are listed, with the exception of some that the UC would like to add. There will be future discussions about how to proceed. Staff envision that they will get some justification of adding the entities to the list, consistant with the criteria. Staff will evaluate and present the information to the Commission, which would amend it into the regulation. Mr. Wallace said that staff does not anticipate returning with the item this year. The list has only changed twice since the seventies, so Mr. Wallace does not see it as a frequent occurrence.

Commissioner Downey added that it would be the responsibility of the UC to come to the Commission to revisit the regulation. His only concern with including the list in the regulation was regarding who would be obligated to review it.

Commissioner Remy moved to approve the amendment to regulation 18702.4. Commissioner Downey seconded the motion. Commissioners Downey, Huguenin, Remy, and Chairman Randolph supported the motion, which carried with a 4-0 vote.

Commissioner Downey moved to adopt regulation 18750.2. Commissioner Remy seconded the motion. Commissioners Downey, Huguenin, Remy, and Chairman Randolph supported the motion, which carried with a 4-0 vote.

Commissioner Downey moved to adopt regulation 18755, with the deletion of the language on lines 26-31. Commissioner Remy seconded the motion. Commissioners Downey, Huguenin, Remy, and Chairman Randolph supported the motion, which carried with a 4-0 vote.

Item #7. Adoption of Amendments to Regulation 18705.5 – Materiality Standard: Economic Interest in Personal Finances.

Executive Fellow Theis Finlev explained that this item consists of amendments to regulation 18705.5, which contains the standard for determining whether a governmental decision has a material financial effect on an official's personal finances. Since the pre-notice discussion at the March meeting, no comment letters have been received, and the language has not changed. Under the PRA, public officials are prohibited from participating in decisions which have a material financial effect on their personal finances. Staff proposes adding the word "appointments" to the list of governmental decisions that may have a material financial effect on an official's personal finances. Currently, the regulation refers to hiring, firing, demoting, promoting, and other actions, but not appointments. Staff also proposes that the regulation be amended to declare as material the financial effect of a decision by a public official that has a unique financial effect on a member of that official's immediate family.

Commissioner Remy asked how this would work in a small city where there is a city manager and city council, and the city manager appoints a councilmember's spouse. He wondered whether, even though the city manager made the appointment, the council would be impacted as the ultimate authority.

Assistant General Counsel John Wallace responded that, even though not specifically addressed in the language of the regulation, any affirming decision by the Council would be a ratification of an employment decision. It would be considered an appointment decision that would require disqualification by the Council member. The Council could still concur in the decision, but without the vote of the disqualified member.

Commissioner Huguenin moved to amend regulation 18705.5. Commissioner Downey seconded the motion. Commissioners Downey, Huguenin, Remy, and Chairman Randolph supported the motion, which carried with a 4-0 vote.

Item #8. Pre-Notice Discussion of Amendments to the Post-Employment "Permanent Ban" Under Regulation 18741.1 – Definition of Supervisory Authority.

Commission Counsel Bill Lenkeit explained that this item involves regulation 18741.1, which relates to the post-governmental employment restrictions of the PRA, including the permanent ban on participating in the same proceeding, also known as the "prohibition against switching sides." The proposed changes are conforming amendments to codify language of the Commission's opinion in 2000, *In re Lucas*, regarding what constitutes supervisory authority. Government code sections 87401 and 87402 prohibit former state officials who participated in a proceeding while employed by a state agency from being paid to represent or assist in representing another person regarding that same proceeding.

Mr. Lenkeit continued that in January 1999, the Commission adopted regulation 18741.1, which sets out the process to determine whether the permanent ban applies. The proposed amendments relate to subdivision (a)(4) of the regulation which defines what constitutes participation in a proceeding. The last sentence currently states that any supervisor is deemed to have participated in any proceeding pending before the employee's agency and which was under his supervisory authority. Adoption of that language in 1999 intended to codify longstanding advice that a supervisor was deemed to have participated if he or she was in the agency's supervisory chain of command over the proceeding while employed by the agency. This interpretation had been approved by the Commission in April, 1991, when it approved the *In re Brown* advice letter. In 1999, the Commission codified the advice in the *Brown* letter in regulation 18741.1.

Mr. Lenkeit explained that in 2000, the Commission revisited the issue in its *Lucas* opinion, where the Commission indicated that the chain-of-command theory does not necessarily go all the way to the top agency officials without some degree of personal involvement in the proceeding by those officials. As a result, the Commission modified the strict chain-of-command theory, stating that where an official who is responsible for creation and implementation of general policies has no such personal involvement in individual audits, he will not be deemed to have participated in those audits for purposes of the permanent ban. Thus, the Commission distinguished the facts in *Lucas* from those in *Brown* in that the latter involved direct supervisory control over the proceedings, while in *Lucas*, those responsibilities were expressly delegated to others in the agency structure. The Commission directed staff to amend regulation 18741.1 to more clearly reflect this distinction, which is what he is presenting.

Mr. Lenkeit said that staff focused on providing a definition for the term "supervisory authority." The proposed amendments attempt to provide guidance to the regulated community to determine when a supervisor has participated in a proceeding so as to invoke the provisions of the permanent ban. He noted that on page 2, lines 4-8, and on line 14, the letters (a), (b), and (c) should be capitalized, not in lower case print. In addition, on line 5, the words "and include" should be deleted and replaced with the words "including, but not limited to."

Chairman Randolph commented that she does not see how subdivision (a) adds to the analysis and interacts with oversight of the administrative functions. She wondered whether, if one is in a position of direct supervision, the ban applies even if one had no interaction with the item. Or does it only apply if a person did something such as assigning the matter? And, if doing something is required, then she is not sure the language in subdivision (a) makes this clear.

Mr. Lenkeit said one would only have to have direct supervision over the matter, according to *Brown's* chain-of-command theory. *Lucas* modified this to say that the chain of supervisors who were subject to the regulation did not necessarily go all the way to the top. So, if the person was a direct supervisor of the employee who handled the matter, he would be deemed involved, even if he had no interaction with the matter other than the fact that it was handled by an employee under his control, but this extends only one level up.

Commissioner Huguenin added that this extends only one level up, since these are alternative criteria. If the supervisor had virtually no communication with the employee, the simple fact of the relationship renders them subject to the provision.

Mr. Lenkeit added that if the supervisor was several levels up, then there would need to be some kind of contact or involvement in the case for that supervisor to be subject to the regulation.

Commissioner Downey commented that subdivision (a) is the *Brown* situation, and the Commission will not be asking on a case by case basis whether a direct supervisor actually participated in the matter.

Mr. Lenkeit agreed, and added that the Commission would only look at whether there was a potential for involvement and it was under the person's control as a supervisor.

Commissioner Downey clarified that the fact that the supervisor chose not to participate would be irrelevant.

Chairman Randolph asked how the Commission would define "direct supervisor."

Mr. Lenkeit said it is a challenging question because each agency might be different.

Commissioner Downey commented that it would be difficult to codify it in a regulation because it depends on the operation of each agency.

Commissioner Huguenin added that the word "direct" is as clear as it can be made.

Commissioner Downey stated that subdivision (a) and the application of *Brown* is okay in dealing with the "direct supervision" definition. He said that in most cases, it will be obvious when there is direct supervision, and when it is not obvious, the facts of each case will need to be examined.

Commissioner Remy questioned how this would impact a governor's chief of staff, for example, who gets involved in a variety of issues that come before the governor. He asked whether this would be considered actual involvement and whether the chief of staff would be permanently banned from working on that issue for the rest of his or her career.

Mr. Lenkeit responded that the involvement would only include the issues involved in that particular proceeding. It would depend on the parties and the issues.

Commissioner Downey asked about policy decisions, which regulate decisions made by a subsequent administration.

Mr. Lenkeit responded that the regulation would not affect policy, only the proceeding and the individuals involved in the specific proceeding.

Chairman Randolph asked Mr. Lenkeit to distinguish between the one-year ban and the permanent ban.

Mr. Lenkeit answered that the permanent ban is a ban on being involved in the same proceeding with the same parties, such as the same case, audit, enforcement matter, or investigation. The one-year ban is a ban on any appearance before that agency.

Commissioner Downey said that the Commission should not permanently ban the person referenced by Commissioner Remy.

Mr. Lenkeit added that in that case, the chief of staff, if personally involved in a specific proceeding involving specific parties, would be permanently banned from participating in that proceeding; however, if the chief of staff simply had general oversight and did not get involved, he or she would not be banned from participating in that proceeding.

Commissioner Remy asked whether this would also ban one who runs a state agency and negotiates an agreement on a particular issue from later providing expert testimony in a legal action about that agreement and getting paid for providing such testimony.

Mr. Lenkeit responded that he did not think that person would be banned from providing such testimony.

General Counsel Luisa Menchaca added that there is an express exemption in a separate post-employment provision for situations where one is appearing as a witness or expert.

Scott Hallabrin, with the Assembly Ethics Committee, said that the Assembly does not take issue with this matter, but he had a few comments to add. As he read the regulation, subdivision (a) refers to "direct supervision" but under (c), the paragraph which defines "supervisory authority" seems to drag the person back in if they are anywhere in the supervisory chain. He suggested attempting to define "direct supervision," to instead be termed, "immediate supervision," or something along those lines. He said that under (a), it appears that "direct supervision" included someone who is anywhere in the supervisory chain. This would mean that a deputy director is a "direct supervisor" since he is in the supervisory chain.

Mr. Lenkeit commented that that was not what the word "direct" meant. The word "direct" came out of the *Lucas* opinion when it was distinguished from *Brown*. He agreed that the language may need to be fleshed out, but he does not favor the term "immediate" supervisor because it may cut off someone who should be included.

Chairman Randolph commented that subdivision (a) discusses "direct supervision" but the language under the other section defining "supervisory authority" seems to define this in a backward way by listing what is not meant by the term. There must be a way to further define "direct supervision" to make it clear that it refers to the person who has immediate responsibility for ensuring that that particular matter gets completed. It should refer to the person who makes sure everything moves through the system properly, as opposed to one who is simply conducting general administrative oversight.

Commissioner Downey advised that it seems everyone is okay with what is trying to be done, which is to codify the *Lucas* opinion. He asks that staff consider what has been discussed here, since this is a pre-notice discussion only.

Ms. Menchaca added that staff would want to bring optional language on the issue of how to define direct or immediate supervision. The use of the term "direct" supervision does not rule out the possibility that the ban would apply to a supervisor a few levels up if they had supervision over any of the employees in the chain who made a determination. In deciding on a term, the Commission would likely want to say whether the term modified *Lucas*, or whether letters like the *Brown* opinion should be rescinded.

Chairman Randolph suggested that there is consensus under subdivisions (b) and (c), but it appears that people are reading (a) in different ways, and it therefore needs to be modified.

Commissioner Remy said he reads it to say that any involvement in the matter by a supervisor in the chain, such as a chief of staff, would fall under this ban.

Chairman Randolph responded that that would be the case if it is a proceeding and the person called the chief of staff about that proceeding. At that point, the chief of staff is actually involved in the proceeding. She said that staff will bring the regulation back to the Commissioners at the July meeting.

Item #9. Pre-notice Discussion of Adoption of New Regulation - Combined Expenditures by Political Party Committees on Federal and State or Local Elections: Proposed Regulation 18530.3.

Senior Commission Counsel Larry Woodlock opened pre-notice discussion about regulation 18530.3, which deals with the subject of combined federal-state expenditures by political party committees. He explained that to ensure that money raised outside federal source and amount limitations are not used to influence federal elections, the federal counterpart of the PRA requires that a portion of mixed-use expenditures (expenditures made to influence both state and federal elections) by political party committees be made from money raised under federal source and amount limitations, or in the special case of Levin funds under a combination of federal and state rules. The regulated community recognizes that mixed federal and state expenditures by political party committees must be allocated between state and federal use and reported in some fashion under both state and federal law. This regulation is brought in response to questions received from the regulated community.

Mr. Woodlock continued to explain that federal allocation formulas sometimes require overestimation of the amount spent to influence federal elections. There is no mandate, however, that California integrate such formulas into its own reporting scheme when there are already allocation methods in common use that also more accurately describe how the money was actually spent. Subdivision (a) of the proposed regulation states that the contribution limit of section 85303(b) applies to all contributions to non-federal accounts intended to benefit state candidates or committees. Subdivision (b) codifies the advice in the *Boling* advice letter regarding treatment of state political activities that are subsidized by federal party activities. Subdivision (c) codifies the formula used in the *Boling* letter to allocate state political expenditures among contributors to a federal party account. Subdivision (d) provides an alternative formula for allocating expenditures on state activities that do not clearly identify a state candidate or measure.

Mr. Woodlock moved on to discuss comment letters on this item. He said that in their comment letter, Lance Olson and Charles Bell seem to urge the Commission to table the proposed regulation without further discussion on the ground that federal law preempts any state regulation of Levin funds. However, a global preemption argument is inconsistent with clear federal law. He mentioned that Mr. Olson and Mr. Bell believe that the state is preempted from regulating Levin funds, but in a letter from Mr. Olson a year ago, Mr. Olson, in asking the Commission to comment on how to report Levin fund receipts and expenditures, described Levin funds in the following way, which is consistent with federal law: "The Levin amendment allows state or local parties to pay an allocable share of some (not all) federal election activity with this new federal version of money raised in accordance with state law, but subject to federal limits. Levin money is money raised from sources that are lawful under state law, even though those sources may not be lawful under federal law (e.g. unions and corporations). The Levin money rules require such funds to be raised in accordance with individual state contribution limits and permissible sources."

Mr. Woodlock advised that to show that state regulation in the area of Levin funds is not entirely preempted, it is enough to read Mr. Olson's own words alongside the words of the federal statute he was summarizing. The pertinent section of that statute describes Levin funds as "amounts which are donated in accordance with state law." The federal regulation implementing that statute, 11CFR Section 300.31(b) says "Compliance with state law: each donation of Levin funds solicited or accepted by a state district or local committee of a political party must be lawful under the laws of the state in which the committee is organized." The regulation further states at subsection (d)(2) "Effect of different state limitations: if the laws of the state in which a state district or local committee of a political party is organized limit donations to that committee to less than the amount specified in paragraph (d)(1) of this section than the state law amount limitations shall control." The Federal Elections Commission (FEC) campaign guide for political party committees on page 42 says much the same thing. Mr. Woodlock said that all of this shows that state law can regulate the use of Levin funds even to the point of setting limits on the donation of Levin funds that are lower than the federal statutory limit.

Mr. Woodlock explained that at the Interested Person's (IP) meeting held in January, Mr. Bell and Mr. Olson both voiced the opinion that California was preempted from regulating Levin funds in any way, but federal law pretty well refutes any claim of global preemption. The statute cited in the comment letter from Mr. Olson and Mr. Bell, 2 USCA § 453, does not provide to the contrary. Instead, it is a general statement, and the annotations to that statute show that it is intended to be applied narrowly. It may be that some individual rules proposed by staff in this regulation conflict with federal law and are not permissible for reasons of a specific demonstrable conflict, but there is no legal basis for an argument that the Commission cannot regulate in this area at all. Staff asks the Commission to consider each proposal on their merits.

Mr. Woodlock added that the comment letter from Mr. Olson and Mr. Bell cites FEC advisory opinion number 2000-24 about an Alaska statute that openly limited the amount of federal funds that could be used to pay for party administrative and generic voter drives. The proposed regulation before the Commission does no such thing. Instead, it says that when federal rules prohibit reimbursement to a federal account from state funds, the state committee must report the resulting benefit to the state committee as an in-kind contribution on its state report. Rather than limit or hinder the operation of the federal rule, this provision requires the state committee to report the effect of the federal rule, nothing more.

Mr. Woodlock noted that the comment letter from Mr. Katz offers the argument that the proposed regulation flunks first grade arithmetic. This argument proves the obvious, that federal and state laws are not always the same. Under the proposed regulation, both federal and state numbers add up to 100% every time. In many cases, the numbers will be exactly the same as they go from 0-100%. The proposed regulation differs only when the federal regulation is demonstrably inaccurate.

Mr. Woodlock mentioned that there were other comment letters complaining about the introduction of new or novel accounting methods. He said this complaint is incorrect. Regardless of the existence of the federal regulations, political advertisements that feature multiple candidates or ballot measures are common in California, especially from political party committees. Treasurers in these committees are accustomed to these kinds of advertisements and measuring, for example, how much space is occupied by each face or name on the advertisement in order to determine the cost allocable to each candidate for reporting under state law. This is standard operating procedure in this state, and it is why April Boling originally asked for advice. She noted that the federal allocation formula conflicted with what her measurements indicated when she measured a door hanger. She asked the Commission how to deal with this, since her position was that she should allocate the expenditure accurately among those advertised on the door hanger, but the federal rule did not allow her to recover all of that money. Mr. Woodlock said the Commission told her to do what she would ordinarily do under California law, which was not a new accounting system. The Commission further advised that if there was a variance between the federal formula and reality, she should consider the benefit to the state committee as an in-kind contribution. Treasurers in these cases are trying to balance the books by measuring the benefit to the state party and trying to account for that benefit. They have been doing this in a variety of ways. The Commission suggested in the *Boling* letter and is presented with a regulation today to adopt a rule that the state form procedure should be followed.

Chairman Randolph suggested discussing the threshold preemption issue before getting into specifics. She said that the federal provisions referred to the funds being consistent with state limits and wondered whether there was similar authority for other areas such as the expenditure and reporting of the funds to show that these other areas are not preempted by federal law.

Mr. Woodlock responded that he was attempting to show that there is not a global preemption issue, and he focused on the contribution limits as the most explicit example. The Commission can use them to justify the entirety of this regulation. If a contribution limit is permissible, then compliance measures are also be permissible, because without such compliance measures, it is not possible to determine whether one is complying with the contribution limit. Much or all of the proposed regulation can be justified as monitoring or compliance provisions which are necessary to enforce the contribution limits which are permissible.

Commissioner Downey commented that the letter from Mr. Olson and Mr. Bell suggests that the Commission might want to get an opinion regarding preemption from the FEC. But, the Commission should look at the substance of the matter.

Mr. Woodlock said he is reluctant to go to the FEC with a vague question.

Commissioner Downey asked what harm, other than delay, could come from sending a question to the FEC. He opined that the Commission should assume that there is not a preemption problem and determine whether it would like the regulation in the first place, then decide whether to ask the FEC for its opinion.

Chairman Randolph suggested hearing from the commentators before moving into specifics.

Lance Olson, from Olson, Hagel, & Fishburn, LLP, began by explaining that the letter Mr. Woodlock quoted from was a letter written a year ago asking for advice from the Commission about whether it though Levin funds were reportable. In that letter, Mr. Olson tried to fairly and accurately describe what Levin funds did without articulating a position. He said that Mr. Woodlock failed to describe another part of the letter where Mr. Olson pointed out why BCRA **(**Bipartisan Campaign Reform Act of 2002**)** and Levin funds are federally regulated dollars. He added that Mr. Woodlock misquoted him from the January IP meeting because Mr. Olson did not attend that meeting.

Mr. Olson continued that there is a major preemption here. As stated in his letter, federal statute is clear that Congress preempts state law with respect to federal elections. The FEC has adopted specific regulations interpreting that section. Regulation 108.7(b) says “federal supercedes state law concerning the … disclosure of receipts and expenditures by federal candidates and federal committees.” Congress has therefore said that it is preempting states with respect to the reporting by federal committees of their receipts of contributions and their expenditures. The Commission’s regulation does just that. The FEC has issued a number of advisory opinions on preemption, including several involving political parties and including the one quoted by Mr. Woodlock. Mr. Olson also wanted to quote from the opinion because it has to do with allocation rules adopted by the FEC. He explained that this advisory opinion predates the enactment of the Bipartisan Campaign Reform Act which changed the allocation rules. Allocation rules were formerly set by regulation, whereas the new rules are largely imposed by Congress, not regulation. He quoted the FEC AO, “by their very nature, the allocable expenses of a state party committee as distinguished from funds raised for and spent solely for the support of a non-federal candidate are intertwined with and can affect federal election activity.” It is this theory on which the FEC concludes in the Alaska case that federal law preempted Alaska’s effort to regulate the allocation rules. There is a prior AO, opinion 93-17, involving the state of Massachusetts, which also related to allocation rules and the state attempting to regulate them, and the FEC came to the same conclusion there as well. Mr. Olson advised that it is pretty clear that at least two of the current FEC commissioners believe that states are precluded from regulating this area. Two of the other commissioners appear to believe that there must be some kind of conflict between the two.

Mr. Olson added that he is not opposed to some reasonable effort to regulate in this area and coming up with a methodology to disclose some of these contributions and expenditures. This regulation does not achieve this. He heard that there was no one at the IP meeting who supported the proposal now before the Commission. Levin funds are reportable contributions and are required to be disclosed on FEC reports. If the Commission required the parties to disclose all contributions reported to the FEC, that would be preempted by federal law and FEC regulation. But to limit it to Levin funds, he does not understand why the Commission would come to a different conclusion with that respect to that. If one were to use Levin funds directly in connection with a state election, it is likely that neither party would object to disclosing that expenditure or campaign contribution that was used to do that. But, that is not what they do. Instead, they keep a separate account where these funds are deposited, reported to the FEC, and transferred for allocable expenses.

Mr. Olson commented that the political parties have always allocated between federal and non-federal activities. Money is transferred out from the non-federal account to reimburse the federal committee, since the law requires payment out of the federal account first. For example, federal law requires rent to be paid out of the federal account. Committees are able to transfer a portion of money, as determined by Congress, out of the state committee into the federal committee, representing what percent of the rent is in connection with non-federal elections and what percent is in connection with federal elections. Committees have always reported to the FPPC the amount of the non-federal money that is transferred to the federal, including the vendor. The Commission is now proposing to change that system, suggesting that Congress got it wrong in determining what percentage is federal versus non-federal. He said the part that he objects to most is that they now have to go back two years and figure out the donors to their federal committee who are now contributing, in theory, to the non-federal committee. This is a tremendous burden.

Mr. Woodlock commented that Mr. Olson is saying that the Commission cannot require reporting of money coming into the California Democratic Party. It is standard practice, exemplified in the *Boling* letter, that a political party committee gets a check, and the treasurer decides, among the party's two or three or four different bank accounts, where to put the money. It might all go into one bank account, or it may be divided among the different bank accounts, assuming the contributor does not specifically earmark it. The problem is that in California, section 85303(b) imposes a contribution limit of $27,900 per year to a political party committee. If someone writes a check for $27,900 and gives that to Ms. Boling, then can they write another $10,000 check and earmark it for the Levin fund? Mr. Woodlock said it seems this would be an open violation of section 85303(b) because the person essentially contributed $37,900 to the party. In other words, the destination bank account should not govern; a party committee should not be able to multiply contribution limits by multiplying bank accounts. The federal rules allow multiple Levin accounts for each committee. There is an interest in knowing what goes into a Levin account because it should count against the annual political party contribution limit.

Commissioner Downey opined that the essence of the regulation does not result in any change in the reporting requirements imposed by federal law. It adds a reporting requirement for this state which references the funds that are regulated by the federal law. He said he is not yet convinced that the proposed regulation impacts the policies which are behind the federal requirements such that it would result in a preemption issue.

Chuck Bell, with Bell, McAndrews, and Hiltacht, representing the California Republican Party, associated himself completely with Mr. Olson's comments. In response to Mr. Woodlock's comment after Mr. Olson spoke, Mr. Bell said that there is a contribution limit on contributions to party committees to be used for state candidate support in section 85303(b). However, in section 85303(c), there is no limit on what the party may accept for things other than use for contributions to support state candidates. The implication that there would be a violation of contribution limits on its face if Levin funds were considered state contributions is inaccurate.

Commissioner Downey asked for clarification on the example that Mr. Woodlock gave, suggesting that it might be a loophole.

Mr. Bell responded that it is not a loophole. He said that amount is expressly permitted to be raised by federal law, and these funds are considered federal funds, not state funds. There is one instance in which those contributions would be considered regular state funds, and that is if the party committee chooses to treat its state, non-candidate account as its Levin fund account. The FEC expressly permits this. But, there are probably two or three Republican county central committees that do this. The concept that this would be a violation of FPPC contribution limits for contributions to be used for state candidate support is erroneous. It is not absolutely false, because if someone gave a contribution to that account and earmarked it for state candidate support, then it would be different.

Mr. Bell added that political parties are the most highly regulated entities in politics. This is more true after BCRA, the federal Bipartisan Campaign Act of 2002, and Proposition 34. The combination of the two Acts is very complicated. He suggested asking the FEC about the scope of preemption because its opinion will dramatically impact how the Commission would want to consider this proposed regulation. He said he understands that it might be useful to submit something more specific to the FEC for consideration, but he is not convinced that the proposed regulation is the one that should be submitted. The problem raised by April Boling is a situation with a mailer with multiple candidates. BCRA says that such a mailing that identifies and endorses a federal candidate must be paid for by federal hard money, and it cannot be reimbursed from a state account. The allocation rules in the past allowed the reimbursement for joint expenses. So April Boling had to pay for the mailer with federal money, but the mailer also endorsed state and local candidates and ballot measures. But, under state law, these are considered contributions reportable under the FPPC. Before BCRA, the state would be able to reimburse the federal account on the basis of the measurements of each candidate's endorsement space on the mailer. Neither the FEC, the FPPC, or the FTB (Franchise Tax Board) questioned that process, but Congress moved the line and no longer allows that reimbursement. April Boling asked how to deal with this on the state report. A mailing cannot be reimbursed, but the FEC has said there can be state reimbursement when the piece is a door hanger. April Boling's publication was both a door hanger and a mailing. When she asked how to report the endorsement of the state candidates, and the Commission told her to report it as a contribution. But then the Commission went on to say that she should take the federal amount and allocate it back to donors to the federal committee and report them as if they were state donors. The only way to get there is by a very complicated calculation method which is very problematic. This is the real issue here. But, the proposed regulation misses this issue and also implicates all of these other joint expenses with which the federal law is preempted and are sometimes paid for with Levin funds. The regulation says that the federal percentage does not control, and that the committee should go back and calculate a state percentage which may be different than the federal percentage. He said that if this is preempted, then the Commission should find out. If it is not preempted, then the Commission should create something rational, because there should not be a conflict between these percentages, as this would require a duplicate set of calculations that will be in conflict. The federal allocation rules include a basic percentage for federal and non-federal, federal and Levin activity. There are rules for calculating how much can be allocated and reimbursed for fundraising, for public communications that mention candidates, for general overhead expenses. The treasurers comments are that these rules are already very complicated and this regulation would make it even more complicated. Treasurers in the past have in good faith tried to report bona fide state activity on their state reports. There is a further problem of attributing to federal donors the payments made by the federal account to benefit a state candidate because it will potentially put them in a situation of having violated the state contribution limits, and they may then be required to file major donor reports that they did not know they would be required to file.

Chairman Randolph asked how Mr. Bell thinks it should be reported if federal funds paid for a portion of the state activity.

Mr. Bell responded that it is adequate to report that the federal account has made a contribution, which is easily reported on a form 460 on the allocation page. This assumes that the contribution has not been earmarked for state candidate support when made to the federal account. The donors are then reported on the federal account.

Chairman Randolph returned to the federal preemption issue and mentioned that in private practice, when advising clients in writing to the FPPC, she told them to frame the question, frame the issue, and lay out what they thought the answer would be.

Mr. Bell offered to help frame it, because he has an interest in getting the issue resolved.

Chairman Randolph said she is unsure how it could be done without at least establishing the basics of the type of questions to ask or regulation to bring to the FEC. It would be useful to have a discussion about specifics.

Mr. Bell responded that that should not be too hard to do. The central issue is how to address the requirement that the federal account is required to pay for public communications that identify a federal candidate and also identify other candidates. BCRA moved the line. He said he fought this issue, went to the U.S. Supreme Court saying that more of these issues must be reportable on state FPPC reports, but lost 5-4. The Commission could ask whether it can require state reporting of what the FEC calls federal election activity. The Commission could ask about Levin funds that are used for state purposes, or whether the Commission has any proper role in otherwise regulating federal Levin funds. He said these might be useful questions to ask. This should be the starting point, and he is willing to work with the Commission in asking these questions.

Mr. Woodlock asked Mr. Bell to clarify what he said about treating the federal subsidy as a transfer of contributions from various federal contributors. He said Mr. Bell seemed to support treating this as a contribution from the federal committee. In the past, the PRA defined political party committees as a person, so that the committee would be subject to the $27,900 limit. He asked whether Mr. Bell would be content with applying this definition in that context.

Mr. Bell responded that there would be a problem with that because the California Republican Party is composed of a federal and a state committee which are affiliated. It seems that treating a contribution from the federal account as something that is limited when there is no money transferred makes no sense.

Chairman Randolph recapped that Mr. Bell's argument is that it would be considered a transfer of funds from the same entity but into different accounts within such an entity.

Mr. Olson suggested that the only question for the FEC is whether Levin funds are reportable and regulated under state law and whether they must be disclosed and counted against contribution limits. An easier alternative would be for the Commission to adopt a regulation that says on allocated expenses between the non-federal and federal accounts, the percentage determined by Congress is sufficient, and the non-federal portion will be reported on the FPPC report. This is what has been done for the last fifteen years and no one has complained. Whether expenditures made from the federal account are reimbursed from the Levin account and to the extent that those constitute contributions or independent expenditures on behalf of state and local candidates and ballot measures, these would be reported on schedule D, the allocation page, as an expenditure made out of the federal committee. If the Commission adopted such a regulation, then it would not need to do anything further, except perhaps ask the FEC whether parties would have to report the Levin funds.

Commissioner Downey said the question that April Boling asked was premised on a partial reimbursement that did not fully equal the value received by the state candidates on the door hanger. He asked Mr. Olson to apply his theory to that situation.

Mr. Olson responded that the April Boling situation is a red herring because it arises in very limited circumstances. He does not know of another situation other than is cases of door hangers, where there is a joint federal and non-federal candidate expenditure and the committee does not have to pay for it entirely from federal funds.

Commissioner Downey asked about a situation such as a mailer, where federal law requires that only federal money can be used to pay for the mailer that includes federal and state candidate endorsements. He asked what they would show on their state reports.

Mr. Olson said he would show the name of the candidate, the office, and any information that would normally be shown on a schedule D, and there would be an indication that it would be paid for from the federal committee, based on an allocation method based on measurements. He advises his clients that the FPPC is preempted from requiring parties to disclose their federal committee contributors on the state report. This is clear from the FEC's regulations. However, he said they think there is a legitimate interest in the state knowing that the federal committee is making these expenditures. If someone wants to know where that money came from, he can go to the FEC's website and view the contributors to the federal party committee.

Chairman Randolph opined that one option could be to ask the FEC any number of possible ways of how the Commission would go about disclosing such information. She asked staff what they thought.

Mr. Woodlock responded that he would like to have concrete proposals in mind before doing that. To the extent that the Commission would ask for general advice, it will receive a rather general response from the FEC and it may require additional letters in the future to narrow the advice. The process could be cut short if the Commission has a focused inquiry.

Chairman Randolph said it appeared that there are two proposals, the draft regulation and Mr. Olson's suggestion.

Mr. Woodlock said that is a good thing, that this is a pre-notice discussion. It has been put out for comment, and Mr. Olson's and Mr. Bell's concerns will be considered in making a decision about the best approach.

Chairman Randolph asked for Mr. Woodlock to return with a draft request to the FEC rather than another proposed regulation. She suggested that a possibility may be to ask questions in the alternative.

Mr. Woodlock said that makes sense to him.

Ms. Menchaca added that she concurred with that suggestion and suggested that the Commission's request include how it would analyze the issue in terms of the various issues discussed. She said that she believes there is a lot of consensus on the issues. Staff want to provide guidance on the issues of reporting and allocation and the issue of contribution limits. There is consensus on the issues, but the approach may differ.

Commissioner Huguenin said that there is another overlap in this area that everyone is familiar with in California every April 15th, when we send a form 1040 and file something with the Franchise Tax Board that is a thin piece that goes on top of the form. Thinking about that as a model, it seems possible that the parties could provide further information to the state by attaching a copy of the list of the federal committee's donors, which is already filed with the FEC. This way, someone looking at the state reports could see without having to go to the FEC's website. It puts the information all in one place. He said he is also concerned about the issue of federal donors being surprised with becoming major donors in California.

Chairman Randolph asked staff to come up with a time table and return with the item.

Item #10. Legislative Report.

Executive Director Mark Krausse mentioned that on the second page of the analysis of SB 929, AB 771 should be the reference in all instances. On the first page, the reference to 20% should instead be a one-third time threshold. He mentioned that he wanted to call the bill to the Commissioner's attention. Staff does not have any strong concerns, but the bill goes into a new area that would expand the lobbyist regulations relating to governmental decisions that involve quasi-adjudicatory decision making. The bill seems to have a very low likelihood of passing, given the two-third vote requirement.

DISCUSSION ITEMS

Item #11. Executive Director's Report.

Executive Director Mark Krausse said that the Commission received a comment letter lauding Teri Rindahl, one of the Commission's employees working on the advice phone lines. He praised the Technical Assistance staff and said that the Commission frequently receives similar letters.

Chairman Randolph agreed. She announced that the date of the June meeting has changed. It will be announced shortly.

Chairman Randolph further mentioned that the Commission will begin looking at the strategic plan at the June meeting. There will be a general discussion of the previous plan and the Commission's accomplishments and ideas to move forward, including internal processes, legislative issues, and more. After the June meeting, there will likely be a process over the course of two or three meetings to allow the public to comment.

Mr. Krausse asked whether an electronic version should be posted on the web.

Chairman Randolph said yes. There will also be materials available before the June meeting.

Item #12. Litigation Report.

General Counsel Luisa Menchaca explained that the Commission received a ruling from Judge Chang relating to the Commission's view that there is an automatic stay regarding regulation 18530.9 because of the Commission's filing of an appeal. Judge Chang ruled that the preliminary injunction was in effect pending the appeal. The Commission filed a petition for a writ of supersedeous before the court of appeal to resolve the issue, and the court of appeal denied the petition. On that basis, the Commission immediately issued a press release relating to the regulation, and Commission staff changed the information on the website to indicate that the limits are not currently in effect. Staff also took other actions to ensure that the information matches the status of enforcement of that regulation. There is a hearing on the 27th regarding a procedural matter.

Commissioners went into closed session at 11:41 a.m.

Commissioners came out of closed session at 12:14 p.m.

Chairman Randolph announced that the June Commission meeting will be on June 15th, 2005.

The meeting adjourned at 12:15 p.m.

Dated: May 20, 2005

Respectfully submitted,

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Whitney Barazoto
Commission Assistant

Approved by:

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Liane Randolph
Chairman